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Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. _____.

UNITED FUNDS, INC., PETITIONER,

VS.

DAN M. NEE, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF MISSOURI, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To The Honorable, The Chief Justice, and Associate Justices of The Supreme Court of the United States:

Your petitioner, United Funds, Inc., respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that Court entered July 27, 1948 (169 F. 2d 33)*, reversing a judgment of the United States District

*Petition for rehearing denied August 18, 1948.

Court for the Western District of Missouri and directing a dismissal of petitioner's complaint. A certified transcript of the record in this case, including the proceedings in said United States Circuit Court of Appeals for the Eighth Circuit, is furnished herewith in accordance with Rule 38 of the rules of this Court.

STATEMENT OF MATTER INVOLVED.

United Funds, Inc., hereinafter referred to as Petitioner, was incorporated October 8, 1940, as a management open-end investment trust of the diversified type, with its principal place of business at Kansas City, Missouri (R. 3, 11, 13, 20, 21). In order to comply with the requirements of Section 80 a-17(f) of the Investment Advisers Act of 1940 (R. 139), Petitioner selected Commerce Trust Company as its Custodian and executed a "Trust Agreement" October 14 1940 (R. 62-88), providing for the transfer of all Petitioner's funds and its own Capital Stock to Custodian (R. 63); for the Custodian to collect and receive all income, profits, rights, etc. (R. 69); and for Custodian to pay for securities as they were ordered with Petitioner's funds in the Custodian's hands (R. 71). The Custodian then selected and registered a nominee in whose name all securities were issued (R. 122, 123) pursuant to a standing order to all brokers from Custodian (R. 124). When the securities were delivered they were paid for by the Custodian, with funds of the Petitioner in its custody (R. 22-23).

When securities were purchased, documentary stamp taxes were paid. However, following an examination and report by a revenue agent (R. 91-93), an assessment was made against Petitioner of additional stamp taxes for the period from November 12, 1940, to June 5, 1944, in the

amount of $5,849.95 (R. 90-93). The assessment was on the theory that Petitioner had transferred its right to receive securities (R. 4, 11), which transfers were subject to tax under Section 1802(b) of the Internal Revenue Code (R. 17). This amount was paid by taxpayer under protest (R. 105), and a claim was made for refund (R. 95). No action having been taken on the claim within six months of filing (R. 7-8, 12), Petitioner filed a complaint in the United States District Court for the Western District of Missouri on February 21, 1946 (R. 1, 3-8), to recover the tax paid with interest from the date of payment.

Defendant's answer (R. 9-12) was filed July 30, 1946, denying all material allegations in plaintiff's complaint.

Trial was had to the court and on June 18, 1948, the court entered its opinion and judgment* that Petitioner recover the tax paid with interest thereon from the time of payment (R. 13-18), finding that Petitioner had no right to receive the securities upon the transfer of which the tax was imposed; and that such a transfer, even if made, came within the specific exemption of Section 1802(b)(1) of the Internal Revenue Code (R. 7, 17).

The Government filed notice of appeal on September 15, 1947 (R. 19), and the cause was heard by the United States Circuit Court of Appeals for the Eighth Circuit. On July 27, 1948, the judgment of the District Court was reversed with directions to dismiss the complaint (R. 146-147).

On August 11, 1948, Petitioner filed its motion for rehearing (R. 148-156) and on August 18, 1948, Petitioner's petition for rehearing was denied (R. 157). On September 7, 1948, upon motion of Petitioner to stay the

*Reported in 72 F. Supp. 134.

mandate, the said Circuit Court of Appeals entered an order staying the issuance of the mandate for a period of thirty (30) days from and after that date (R. 158).

STATEMENT OF BASIS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(a) Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of June 7, 1934, Chapter 426, 48 Stat. 926 (28 U. S. C. A. 347*a*).

(b) The date of the judgment sought to be reviewed.

The judgment of the Circuit Court of Appeals reversing the judgment of the District Court was entered July 27, 1948 (R. 146-147), and Petitioner's petition for rehearing was denied on August 18, 1948 (R. 157). This petition for writ of certiorari and supporting certified transcript of the record were filed in this court within three (3) months from August 18, 1948.

THE QUESTIONS PRESENTED.

I.

Did the appointment by Petitioner of a Custodian as required by Section 80 a-17(f) of the Investment Advisers Act of 1940, and the Custodian's subsequent purchases of securities on behalf of Petitioner, constitute a taxable transfer of Petitioner's right to receive securities?

II.

If there was such a transfer of a right to receive, was it effected at a time when the tax was impossible of computation?

III.

If there was such a transfer, was it not exempt from the imposition of the tax:

(a) Because of the specific exemption of Section 1802(b)(1) of the Internal Revenue Code, and

(b) Because of the recognized rule that doubtful or ambiguous tax regulations will be construed most strongly in favor of the taxpayer?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Eighth Circuit Court of Appeals has ruled that when a custodian, who held the assets of Petitioner as required by law, purchased securities on behalf of Petitioner with the funds of Petitioner, there was a transfer of Petitioner's right to receive those securities to the custodian, and in so ruling has decided an important question of Federal law, and such holding is in conflict with applicable decisions of other Courts of Appeals and with prior decisions of the Circuit Court of Appeals for the Eighth Circuit.

Birmingham v. *Central Life Assur. Soc.*, 141 F. 2d 116 (C. C. A. 8th, 1944).

Occidental Life Insurance Co. v. *Rogan*, 141 F. 2d 1011 (C. C. A. 9th, 1944).

Corporation of America v. *McLaughlin*, 100 F. 2d 72 (C. C. A. 9th, 1938).

Orpheum Bldg. Co. v. *Anglim*, 127 F. 2d 478 (C. C. A. 9th, 1942).

2. The Circuit Court of Appeals for the Eighth Circuit has held that the transfer of the right to receive occurred when custodian purchased the securities. In so holding, the Court has ignored the plain meaning and

effect of Petitioner's compliance with the Investment Advisers Act, and has reached a decision in conflict with the decisions of another Circuit Court of Appeals.

Investment Advisers Act (1940), Section 80 **a-17(f).**

Corporation of America v. *McLaughlin*, 100 F. 2d 72 (C. C. A. 9th, 1938).

3. The Court of Appeals has decided that, in failing to "attach" an exemption certificate to the transfer of its right to receive, Petitioner was not eligible for the exemption specifically provided for in the Internal Revenue Code, and in so doing has ignored and refused to apply the rule of construction that doubtful or ambiguous taxing statutes should be construed most favorably to the taxpayer, and has so far ignored the plain meaning and intendment of the applicable statutes and regulations as to call for this court's power of supervision.

Internal Revenue Code, Section 1802(b)(1).

Treasury Regulations 71(D), Section 113(f) (1941).

T. D. 5578, 1947-21, Int. Rev. Bull. 14.

McFeely v. *Commissioner*, 296 U. S. 102, 111, 56 S. Ct. 54, 58, 80 L. Ed. 83, 101 A. L. R. 304.

Crooks v. *Harrelson*, 282 U. S. 55, 61, 51 S. Ct. 49, 51, 75 L. Ed. 156.

Reinecke v. *Gardner*, 277 U. S. 239, 244, 48 S. Ct. 472, 72 L. Ed. 866.

Birmingham v. *Central Life Assur. Co.*, 141 F. 2d 116 (C. C. A. 8th, 1944).

Corporation of America v. *McLaughlin*, 100 F. 2d 72, 74 (C. C. A. 9th, 1938).

Wherefore, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding said court

to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Eighth Circuit in the case entitled Dan M. Nee, United States Collector of Internal Revenue for the Sixth District of Missouri, Appellant, vs. United Funds, Inc., a Corporation, Appellee, Docket No. 13654, to the end that this cause may be reviewed; and that the Petitioner be granted such other and further relief in the premises as to the Court may seem appropriate and proper.

United Funds, Inc. (Petitioner),

By _____,

DANIEL L. BRENNER,

Counsel for Petitioner.

ROACH, BRENNER & WIMMELL,
of Kansas City, Missouri,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. _____.

UNITED FUNDS, INC., A CORPORATION,
PETITIONER,

VS.

DAN M. NEE, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF MISSOURI,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS IN THE COURT BELOW.

The opinion of the District Court is reported as 72 F. Supp. 134.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 169 F. 2d 33, and appears in full in the record (R. 132-145).

II.

STATEMENT OF BASIS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of June 7, 1934, Chapter 426, 48 Stat. 926 (28 U. S. C. A. 347a).

III.

STATEMENT OF THE CASE.

Petitioner has stated the case in the "Summary statement of the matter involved" in the foregoing petition for writ of certiorari, which is hereby adopted and made a part of the brief.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals erred in holding that Petitioner transferred its right to receive securities to its Custodian.

2. The Circuit Court of Appeals erred in ruling that the time of the transfer of the right to receive was contemporaneous with the purchase of securities by Custodian.

3. The Circuit Court of Appeals erred in holding that Petitioner was not exempt from the documentary stamp taxes.

4. The Circuit Court of Appeals erred in refusing to apply the rule of construction that doubtful taxing statutes will be construed most strongly in favor of the taxpayer.

V.

ARGUMENT.

POINT A.

Petitioner's appointment of a custodian to receive its assets and securities, as it was required by law to do, did not constitute a transfer of a right to receive which was subject to a documentary stamp tax under the Internal Revenue Code.

Section 80(a)-17(f) of the Investment Advisers Act of 1940 required, for the protection of investors, that Petitioner place and maintain its securities and similar investments with a Custodian. This Petitioner did. The position of the Commissioner is that such required course of procedure nevertheless constituted a taxable transfer of the right to receive legal title to securities.

The only analogous situations of which your Petitioner is aware are those involving the compulsory transfer by insurance companies of securities to state insurance commissioners to protect the value of their policies within the various States. The situations are precisely parallel, a required deposit of securities with a custodian to protect investors. And the ruling of the Eighth Circuit Court of Appeals, as well as other Courts of Appeals, has been that such transfers do not constitute a transfer of legal title or the right to receive legal title, but only a transfer of possession.

In *Birmingham* v. *Central Life Assur. Soc.*, 141 F. 2d 116 (C. C. A. 8th, 1944), the insurance company paid, under protest, a documentary stamp tax on its delivery of bonds to the Iowa Insurance Commissioner. It then instituted suit to recover the taxes so paid. From a District Court judgment for the insurance company Commis-

sioner appealed. The Eighth Circuit Court of Appeals approved the holding of the District Court, saying l. c. 118, 119:

> "The transaction does not involve a sale, an agreement to sell, a memorandum of sale or a delivery or transfer of legal title to the securities deposited. The purpose or intent with which the delivery was made must, therefore, be considered; for it is inconceivable that Congress intended to tax under this section every delivery of bonds, except those enumerated in the provisos, under all circumstances, without regard to the purpose, the intent, or the jural relations of the parties. The single fact that A delivers bonds to B is insufficient to enable either the Commissioner of Internal Revenue or the court to determine whether or not such delivery is taxable under the statute. Some intent or purpose is necessary to give meaning to the delivery. * * * To be taxable under Section 3481 within the meaning of the regulation, the delivery of bonds must at least be with intent to pass title. This is a reasonable construction of the statute, and no reason appears why it should not be applicable in this case. Nothing in the statute or the regulations points to a contrary conclusion. The argument of the Collector that mere physical delivery of the bonds is taxable is inconsistent with the regulation."

Almost contemporaneously with this decision, the Ninth Circuit Court of Appeals reached precisely the same conclusion in *Occidental Life Insurance Co.* v. *Rogan,* 141 F. 2d 1011 (1944).

On the hearing of your Petitioner's case in the District Court (72 F. Supp. 134) the court recognized that the Custodian occupied the same position as the Commissioner of Insurance in *Birmingham* v. *Central Life Assur. Soc., supra,* and upheld Petitioner's contention

that there had been no transfer of the right to receive legal title to securities from Petitioner to its Custodian. And see: *Corporation of America* v. *McLaughlin*, 100 F. 2d 72, 75 (C. C. A. 9th); *Orpheum Bldg. Co.* v. *Anglim*, 127 F. 2d 478 (C. C. A. 9th, 1942).

In determining that Petitioner was liable for a documentary stamp tax as a transferor of a right to receive because of its appointment of a Custodian to hold its securities for the protection of its investors, as it was required by law to do, the Circuit Court of Appeals has reached a conclusion in conflict with its own prior decisions and the decisions of other Circuit Courts of Appeal.

POINT B.

Assuming a transfer of petitioner's right to receive, such transfer was made before the purchase of any securities, and any attempted tax must fail since it would be impossible of computation.

Assuming, without admitting, that there was a transfer of a right to receive legal title from Petitioner to its Custodian, when was such transfer accomplished? Before any securities were purchased, all of Petitioner's funds were transferred to its Custodian under the terms of a "trust" agreement, Custodian selected and registered its nominee, and Custodian notified the brokers that stock was to be issued to the nominee. The transfer must necessarily have occurred upon the completion of these arrangements. The levying of a transfer tax on a transfer of the right to receive from Petitioner to Custodian each time a broker delivered securities to Custodian's nominee (with the broker paying a documentary stamp tax at that time) not only imposes double taxation upon Petitioner, but is in direct contravention of a decision of the Ninth Circuit Court of Appeals. In *Corporation of America* v. *McLaughlin*, 100 F. 2d 72, 74 (1938), it was held:

"So far as concerns the 1,200,000 shares of stock dividends, we assume, for purposes of determining the character of their subsequent issue, that the trustees acquired from the corporation all the shares on which the stock dividends were subsequently declared, by a transfer from third parties of the right to receive such shares. On this assumption the question is, 'Is that transfer of the original shares a transfer also of the right to receive stock dividends not then declared but which may possibly be declared in the future?'

"Such a purpose in the minds of Congress is conceivable, but is open to the objection that the incidence of the tax is not when the stock dividend is distributed but the time of the transfer of the right to receive the stock to which the subsequent dividend is declared. The stamps are to be affixed then, and their amount, if it includes the right to future stock dividends is *impossible of computation* * * *" (Italics added).

POINT C.

The transactions of taxpayer were exempt from stamp taxes under the specific provision of Section 1802(b)(1) of the Internal Revenue Code and the recognized rule of construction that a taxing statute of doubtful intent shall be construed most strongly in favor of the taxpayer.

After the decisions in the Supreme Court that transfers of the right to receive securities were subject to the documentary stamp tax (*Raybestos-Manhattan Corp.* v. *United States*, 296 U. S. 60, 56 S. Ct. 63, 80 L. Ed. 447; *Founders General Co.* v. *Hoey*, 300 U. S. 268, 57 S. Ct. 457, 81 L. Ed. 639), Congress amended Section 1802 of the Internal Revenue Code to specifically exempt owner-custodian transactions:

"Section 1802 * * * (b) * * * The tax shall not be imposed upon deliveries or transfers of shares or certificates—(1) From the owner to a custodian if under

a written agreement between the parties the shares or certificates are to be held or disposed of by such custodian for, and subject at all times to the instructions of the owner; * * *. No exemption shall be granted under this paragraph unless the deliveries or transfers are accompanied by a certificate setting forth such facts as the Commissioner, with the approval of the Secretary, may by regulation prescribe as necessary for the *evidencing of the right to such exemption* * * *" (Emphasis added).

Treasury Regulations 71(d), Section 113(f), 1941, provide for such a certificate to be attached to shares which are transferred in order that they be exempt from the stamp tax.

The Regulation is clearly limited to those instances in which there is a physical transfer of shares, and manifests no requirement that an exemption certificate accompany the ethereal transfer of a right to receive. Giving the regulation the benefit of a most liberal interpretation, without *any* techical refinements in construction it is still no more than doubtful and ambiguous.

The Circuit Court of Appeals ruled that, since provisions granting special tax exemptions are to be strictly construed, the above regulation would be interpreted as requiring that a certificate accompany the transfer of a right to receive from Petitioner to its Custodian in order that such transfer be exempt under Section 1802(b) of the Internal Revenue Code. In so doing, the Court's ruling conflicts with applicable decisions of this court, its own prior decisions, and the decisions of other Circuit Courts of Appeals.

The holding of this same Eighth Circuit Court of Appeals in *Birmingham* v. *Central Life Assur. Co., supra,* is particularly applicable. This case, as previously noted, in-

volved an attempt to impose a documentary stamp tax upon the delivery of bonds by the insurance company to the Iowa Insurance Commissioner. The Collector there requested application of the same rule of construction applied in the instant case. Said the Court (141 F. 2d 116, 119):

> "It is urged further that the provisions of the statute are to be interpreted broadly; that they evidence an intent of Congress to tax every transaction within the reach of their terms; and that those terms are not to be narrowed by technical requirements, citing *Raybestos-Manhattan Co.* v. *United States*, 296 U. S. 60, 56 S. Ct. 63, 80 L. Ed. 44, 102 A. L. R. 111; *Founders General Corp.* v. *Hoey*, 300 U. S. 268, 57 S. Ct. 457, 81 L. Ed. 639, and like cases. It is true that the reach of a taxing act whose purpose is obvious is not to be restricted by technical refinements (296 U. S. 60, 56 S. Ct. 65, 80 L. Ed. 44, 102 A. L. R. 111), or narrowed by technical requirements. It is also true that 'a taxing statute, if of doubtful intent, should be construed favorably to the taxpayer.' *McFeely* v. *Commissioner*, 296 U. S. 102, 111, 56 S. Ct. 54, 58, 80 L. Ed. 83, 101 A. L. R. 304. 'Such statutes are not to be extended by implication beyond the clear import of the language used.' *Crooks* v. *Harrelson*, 282 U. S. 55, 61, 51 S. Ct. 49, 51, 75 L. Ed. 156; *Reinecke* v. *Gardner*, 277 U. S. 239, 244, 48 S. Ct. 472, 72 L. Ed. 866. The statute cannot be construed to include transactions not clearly within the intent of Congress. In the present case an intent to transfer the legal title to the securities to the insurance commissioner is absent * * *." See also *Corporation of America* v. *McLaughlin*, 100 F. 2d 72, 74 (C. C. A. 9th, 1938).

To levy a tax upon a transaction which is specifically exempted from such taxation because an unrequired certificate is not attached to an intangible right to receive ignores the long established rule of construction that doubtful or ambiguous provisions will be construed in

favor of the taxpayer, your Petitioner. The doubtfulness and ambiguity of the Regulation was recognized by the Treasury Department's subsequent amending of Section 113(f) of Treasury Regulation 71(D) (1941) by T. D. 5578, 1947-21, Int. Rev. Bull., 14, to eliminate this defect.

CONCLUSION.

It is respectfully submitted that in upholding the imposition of a second documentary tax stamp upon Petitioner, the Eighth Circuit Court of Appeals has transgressed the decisions of this Court, the decisions of other Circuit Courts of Appeal and its own prior decisions to an extent calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing the said decision.

DANIEL L. BRENNER,
Counsel for Petitioner.

ROACH, BRENNER & WIMMELL,
of Kansas City, Misssouri,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 341

UNITED FUNDS, INC., A CORPORATION, PETITIONER

v.

DAN M. NEE, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF MISSOURI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 13–16) is reported at 72 F. Supp. 134. The opinion of the Court of Appeals (R. 130–143) is reported at 169 F. 2d 33.

JURISDICTION

The judgment of the Court of Appeals (R. 143–144) was entered on July 27, 1948. A petition for rehearing (R. 145–147) was denied on August 18, 1948 (R. 155). The petition for a writ of certiorari was filed on October 6, 1948.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether, under the applicable stamp tax provisions of the Internal Revenue Code, there was a taxable transfer from the taxpayer to the Commerce Trust Company of the right to receive certain shares of stock.

2. Whether, in any event, the stamp taxes were correctly imposed here because of the transfer of the shares in question to the nominee of Commerce, in the absence of the necessary exemption certificate.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and Regulations involved are set forth in the Appendix, *infra,* pp. 15–22.

STATEMENT

The material facts in this case, which was tried before the District Court without a jury (R. 1), are as follows:[1]

[1] A more complete statement of the material facts than is made in the petition (pp. 2–4) is believed necessary. The facts in the case were, as pointed out by the court below (R. 131), undisputed: They were developed by pleadings (R. 3–8, 11–12), statements of counsel for the respective parties (R. 20–34), and certain testimony and exhibits (R. 34–127). While the separate findings of fact made by the trial court (R. 17–18) and the factual statements contained in its memorandum opinion (R. 13–16) were incomplete, a fairly complete recital of the facts is contained in the opinion of the court below (R. 131–135).

The taxpayer was incorporated October 8, 1940, as a management open-end investment trust of the diversified type, with its principal place of business at Kansas City, Missouri. (R. 3, 11, 13, 20–21.) By its articles of incorporation (R. 35–36) the taxpayer was authorized to "subscribe for, purchase, invest in, or otherwise acquire, own, hold, sell, negotiate, possess, exchange, transfer or otherwise dispose of and deal in and with shares of capital stock", bonds and other securities of any kind—"to the same extent as natural persons might or could do" (R. 4). The articles authorized the taxpayer to enter into contracts "for the purpose of depositing its cash, securities and other property in trust" (R. 5) with banks or trust companies having certain minimum capital, and provided further that all "cash and securities owned by the corporation from time to time shall be placed in trust" under the terms of an agreement approved by the directors and shareholders with one or more banks or trust companies having certain minimum capital (R. 5, 132).

On October 14, 1940, an agreement (R. 62–87) was entered into between the taxpayer and Commerce Trust Company (in which the taxpayer is designated as the "Corporation" and Commerce as the "Trustee" (R. 62)), which provided for the deposit by the taxpayer of certain cash and certificates of its own shares of capital stock and dealt with the matter of sale of those shares

(R. 63–66). The agreement contained the following provision (R. 71–72):

> SECTION 2.10. At any time, and from time to time, the Corporation may direct the Trustee to use any cash then held by the Trustee with respect to the shares of stock of the Corporation of any class, for the purchase of any securities of the corporation and/or securities included on the approved list with respect to such class, within the limitations herein provided. Whenever the Corporation shall hereafter purchase or direct the Trustee to purchase any securities the Corporation shall furnish to the Trustee an Officers' Certificate specifying (a) the securities so purchased or to be purchased, (b) the class of stock of the Corporation, the assets appertaining to which are to be used to pay for the same, (c) the amount to be paid therefor, (d) the person or persons to whom such amount is to be paid, and (e) that the securities are those of corporations and/or securities then included on the approved lists with respect to the class of Capital Stock for which it is being purchased, and the purchase thereof is in accord with the limitations set forth in the Articles of Incorporation or any amendment thereto. Upon receipt of such Officers' Certificate, the Trustee shall pay the amount set forth in such Officers' Certificate to be paid for the securities so purchased or to be purchased, certified as aforesaid, to the person

> or persons specified in the aforesaid Officers' Certificate against delivery to the Trustee of such securities (in such form as at the time constitutes good delivery under the rules or practices of the New York Stock Exchange) and shall charge the amount of such payment against the Deposited Property appertaining to the class of Capital Stock of the Corporation so specified.

As described by taxpayer's counsel in his opening statement (R. 21–23) and by taxpayer's two witnesses (R. 119–120, 122–124), and as illustrated by "sample copies" of forms used during the period in question (Ex. 6, R. 109; Ex. 7, R. 110; Ex. 8, R. 111; Ex. 11, R. 117), the method followed by the taxpayer in the purchase of securities was as follows:

The taxpayer had a contract with United Funds Research Corporation, under which the latter advises as to all investments made with the taxpayer's funds; the officers of Research, when they have decided on the purchase of certain securities, place an order, with one of the brokers with whom the taxpayer dealt, and later deliver to the taxpayer a form giving notice of the purchase of the particular securities; the taxpayer then "executes an Officers' Certificate which is addressed to the Commerce Trust Company as Trustee, advising the Trust Company, and directing the Commerce Trust Company, to pay

for certain securities through the designated broker, at a designated price, against delivery of the security". (R. 22.) When the securities are delivered they are paid for by Commerce with funds of the taxpayer in its custody. (R. 22–23.) All orders for the purchase of securities are placed in the name of the taxpayer. (R. 30.) (See also R. 133–134.)

All of the securities purchased by the taxpayer during the period in question were transferred from the sellers direct to Margaret Gaffney, the registered nominee of Commerce; at the time of each purchase documentary stamps were affixed to the securities by the respective sellers, and the tax involved in this action was in addition thereto. (R. 6–7, 12.) As testified, at the inception of the taxpayer's activities in 1940, Commerce had selected and registered its nominee with the Collector of Internal Revenue and notified the brokers that securities purchased for the taxpayer should be issued in the name of such nominee. (R. 122–123.)[2]

After examination and report by a revenue agent, an assessment was made against the taxpayer of documentary stamp taxes for the period

[2] Plaintiff's Exhibit 10 (R. 124) is a "typical form of instruction" (R. 123) given to all brokers—to the effect that all securities purchased by the taxpayer are issuable in the name of the nominee.

from November 12, 1940, to June 5, 1944, in the amount of $5,849.95, which was subsequently paid (R. 3–4, 11), and after filing a claim for refund (R. 95–103), the taxpayer brought the present action for its recovery (R. 3–8).[3] In the agent's report, the proposed assessment was predicated upon the theory that the taxpayer had purchased securities in its name and thereby acquired the right to receive them, and that by directing that the securities be delivered to Commerce the taxpayer thereby transferred its right to receive the securities, and those transfers were subject to tax under Section 1802 (b) of the Internal Revenue Code. (See R. 17.)[4]

The District Court concluded that (1) the taxpayer had no right to receive the securities upon the transfer of which the tax was imposed, and (2) that the transfers in question were within the exemption provided for by Section 1802 (b) of

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[3] Since not brought until more than six months after the filing of the claim (R. 1, 7–8), the action could be instituted even though the claim had not been acted upon. See Section 3772 of the Internal Revenue Code.

[4] A copy of the agent's report appears in the record as Exhibit 3–b. (R. 91–93.) Attached to the report there was a schedule of the securities purchased during the period in question, showing the various lots purchased and the taxes due on each, and the total tax due, but the schedule was omitted from the printed record on appeal (R. 93) since there was no controversy as to *the amount* of the tax, if it was properly imposed.

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the Internal Revenue Code (R. 17–18),[5] and accordingly entered a judgement in favor of the taxpayer (R. 18). On appeal, the court below held that neither of the two above stated conclusions of the trial court could be sustained on the facts (R. 135–143), and accordingly reversed the judgment of the District Court with directions to dismiss the complaint (R. 143–144).

ARGUMENT

1. Upon the undisputed facts of this case, the court below correctly held that the taxpayer transferred to Commerce or its nominee the right to receive the securities purchased by the taxpayer, and that the transfers of the "rights to receive" the shares in question were subject to tax under the provisions of Section 1802 (b) of the Internal Revenue Code (Appendix, *infra*). (R. 135–139.) The taxability of transfers of rights to receive shares of stock was conclusively settled by the decisions of this Court in *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60, and *Founders General Co.* v. *Hoey,* 300 U. S. 268. The court below correctly applied the principles

[5] While included in the trial court's so-called "Findings of Fact" (R. 17), these were really conclusions, clearly reviewable on appeal. The trial court also made a "finding of fact" that Commerce was a mere custodian (R. 17)—who within the terms of Section 1802 (b) of the Code held for and subject to the instructions of the owner—but that conclusion was not attacked by the Collector in the appeal to the court below (R. 140).

enunciated in those cases, and there is no occasion for any further review.

2. The petition rests on the erroneous assumption that Commerce, the custodian, was the purchaser of the securities in question. (Pet. 4, 5.) The method followed by the taxpayer in the purchase of the securities, as hereinabove described (see R. 21–22, 119–120, 122–123; see also R. 109, 110, 111, 117), demonstrates beyond doubt that the taxpayer was in fact the purchaser and consequently had the "right to receive" the securities. All orders for securities were initiated by Research, the taxpayer's investment advisor, for and in behalf of the taxpayer, in the name of the taxpayer (R. 134), and as conceded by taxpayer's counsel in the trial court (R. 30), were "the same" as orders given by the taxpayer itself. The taxpayer's orders for the securities, carrying with them the implied agreement or obligation to pay for them, gave rise, by operation of law, to a right in the taxpayer to receive the shares. *Raybestos-Manhattan Co.* v. *United States, supra,* p. 64. The court below recognized that the taxpayer was the purchaser, and had the right to receive the shares, and in so doing correctly disposed of the taxpayer's contention that it never had the right to receive the securities because of provisions of its articles of incorporation, its agreement with Commerce, or the Investment Advisors Act of 1940. (R. 134–139.) The con-

tention, which is repeated in this Court (Pet. 5–6, Br. 11), is obviously without merit, as is fully demonstrated by the court below (R. 138–139).

In this Court, the taxpayer advances an additional argument that, if the taxpayer did have a right to receive, it effected a transfer of it as to all future purchases at the time of the inception of its operations when it made the arrangements with Commerce, and that therefore any attempted tax must fail because it would be "impossible of computation." (Pet. 4, Br. 10, 13.) This argument is also without merit. While the transfer of the right to receive each lot of securities purchased may have come about pursuant to the standing arrangements originally made, the actual transfer was made at the time of each purchase, when the taxpayer issued its "Officers' Certificate (R. 22), directing Commerce to pay for the securities purchased (R. 138–139), and therefore the tax was computable and was properly computed upon each lot of securities purchased (R. 134–135). In any event, the transfer of a right to receive shares of stock is taxable, whether the grant of the right occurs at the same time or before or after the purchase is made. See Section 1802 (b) of the Internal Revenue Code; *Raybestos-Manhattan Co.* v. *United States, supra; Founders General Co.* v. *Hoey, supra.*

3. The decision below is not in conflict, as petitioner claims (Pet. 5–6, Br. 13–14), with *Corpora-*

tion of America v. *McLaughlin,* 100 F. 2d 72 (C. C. A. 9th), or *Orpheum Bldg. Co.* v. *Anglim,* 127 F. 2d 478 (C. C. A. 9th). Those cases follow the principles laid down in the *Raybestos* and *Founders* decisions, and apply them to the facts there presented, which are different from the facts in this case. Nor is the decision below in conflict with *Birmingham* v. *Central Life Assur. Soc.,* 141 F. 2d 116 (C. C. A. 8th), and *Occidental Life Ins. Co.* v. *Rogan,* 141 F. 2d 1011 (C. C. A. 9th). Those cases involve a tax on the sale or transfer of bonds, which tax, under Section 3481 of the Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 3481), attaches to sales or transfers of legal title or deliveries with intent to pass title, but does not reach transfers of the right to receive, such as are reached by Section 1802 (b) of the Code in the case of shares of stock.

4. On the other phase of the case, the court below correctly held (R. 139–143) that the transfers of the right to receive the shares in question to Commerce were not exempt from tax under the provisions of Section 1802 (b) exempting transfers from an owner to a custodian, because of the absence of the "exemption certificate" required as a condition to the exemption—even though Commerce admittedly (R. 140) could be regarded as a "custodian", who within the terms of the statute held for and subject to the instruc-

tions of the owner. The admitted (R. 140) absence of the exemption certificate is fatal to the claim of exemption, because, as the court below recognized (R. 140), the statute requires a certificate in the case of *all transfers,* including transfers of "rights to receive" as well as the physical transfers of certificates. The Regulations promulgated pursuant to the express authority contained in Section 1802 (b) of the Code, Section 113.35 (f) of Treasury Regulations 71 (Appendix, *infra*), do not, as claimed (Br. 15), limit or restrict the statutory requirement of a certificate to the case of a physical transfer of shares. The court below correctly stated that the Regulations "neither add to nor take anything from" (R. 142) the provisions of the statute; and its opinion contains, we submit, a complete answer to the argument of the taxpayer on this phase of the case.

There is no doubt whatever, either in the statute or in the Regulations, to be resolved in favor of the taxpayer, as claimed. (Pet. 6, Br. 15–16.) Consequently, the decision below is not in conflict with *McFeely* v. *Commissioner,* 296 U. S. 102, and other cases in which it has been said that doubtful taxing statutes should be construed favorably to the taxpayer.

5. Finally, it may be noted that the tax was in any event correctly imposed because of the transfer of the shares in question directly to the

nominee of Commerce, since there were no exemption certificates. In other words, even if it were assumed that the taxpayer did not have the right to receive the shares purchased, and that that right rested in Commerce, and that Commerce made the purchases, as claimed (Pet. 4, 5), the tax was in any event correctly imposed because of the issuance of the shares in the name of the nominee of Commerce, since that would involve a transfer of the right to receive from Commerce to its nominee. Such a transfer from a custodian to its nominee would be exempt under the statute, but that exemption is also granted only upon condition that there be an exemption certificate and, since in this case there were no exemption certificates, the transfer from Commerce to its nominee of the right to receive the shares in question would therefore not qualify for the exemption under the statute.

Similarly, there would, of course, be no right to exemption even if the rights to receive the shares be viewed as having been transferred from the taxpayer directly to the nominee of Commerce. Although the statute does not expressly mention a transfer direct from the owner to a nominee of a custodian, Section 113.35 (f) of the Regulations states that such a transfer will be exempt from tax, but only if there is an exemption certificate—and there was none in this case.

CONCLUSION

The decision below is correct. It turns upon the particular facts of the case and presents no question calling for further review by this Court. There is no conflict of decisions. The petition should, therefore, be denied.

Respectfully submitted.

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NOVEMBER 1948.

APPENDIX

Internal Revenue Code:

CHAPTER 11—DOCUMENTS, OTHER INSTRUMENTS, AND PLAYING CARDS

SUBCHAPTER A—RATE AND PAYMENT OF TAX

SEC. 1800. IMPOSITION OF TAX.

There shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in sections 1801 to 1807, inclusive, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, the several taxes specified in such sections.

(26 U. S. C. 1946 ed., Sec. 1800.)

* * * * *

SEC. 1802.[6] CAPITAL STOCK (AND SIMILAR INTERESTS).

(a) *Original Issue.*—On each original issue, * * * of shares or certificates of stock, * * * on each $100 of par or face value or fraction thereof of the certificates issued by such corporation or by such investment trust or similar organization (or of the shares where no certificates were issued), 10 cents until July 1, 1939, and 5 cents thereafter: * * *

[6] Section 1802 (a) and (b) was subsequently amended with respect to the rates of tax, by Section 521 of the Revenue Act of 1941, c. 412, 55 Stat. 687.

(b) *Sales and Transfers.*—On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subsection (a), or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued) 4 cents until July 1, 1939, and 2 cents thereafter, and where such shares or certificates are without par or face value, the tax shall be 4 cents until July 1, 1939, and 2 cents thereafter, on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share as the case may be): *Provided,* That in case the selling price, if any, is $20 or more per share the above rate shall be 5 cents instead of 4 cents until July 1, 1939: *Provided further,* That it is not intended by this chapter to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited nor upon the return of stock loaned: *Provided further,* That the tax shall not be imposed upon deliveries or

transfers to a broker or his registered nominee for sale, nor upon deliveries or transfers by a broker or his registered nominee to a customer for whom and upon whose order the broker has purchased same, nor upon deliveries or transfers by a purchasing broker to his registered nominee if the shares or certificates so delivered or transferred are to be held by such nominee for the same purpose as if held by the broker, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: *Provided further,* That the tax shall not be imposed upon deliveries or transfers from a fiduciary to a nominee of such fiduciary, or from one nominee of such fiduciary to another, if such shares or certificates continue to be held by such nominee for the same purpose for which they would be held if retained by such fiduciary, or from the nominee to such fiduciary, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: *Provided further,* That in case of sale where the evidence of transfer is shown only by the books of the corporation or other organization the stamp shall be placed upon such books; and where the change of ownership is by transfer of the certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is made by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of

the sale, and the matter or thing to which it refers: *Provided further,* That as used in this section the term "registered nominee" shall mean any person registered with the collector in accordance with such rules and regulations as the Commissioner with the approval of the Secretary shall prescribe. The tax shall not be imposed upon deliveries or transfers of shares or certificates.—

(1) From the owner to a custodian if under a written agreement between the parties the shares or certificates are to be held or disposed of by such custodian for, and subject at all times to the instructions of, the owner; or from such custodian to such owner;

(2) From such custodian to a registered nominee of such custodian, or from one such nominee to another such nominee, if in either case the shares or certificates continue to be held by such nominee for the same purpose for which they would be held if retained by such custodian; or from such nominee to such custodian.

No exemption shall be granted under this paragraph unless the deliveries or transfers are accompanied by a certificate setting forth such facts as the Commissioner, with the approval of the Secretary, may by regulation prescribe as necessary for the evidencing of the right to such exemption. No delivery or transfer to a nominee shall be exempt under this paragraph unless such nominee, in accordance with regulations prescribed by the Commissioner, with the approval of the Secretary, is registered with the Commissioner.

The tax imposed by this subsection shall not be imposed upon any delivery or transfer by an executor or administrator to a legatee, heir, or distributee of shares or certificates of stock if it is shown to the satisfaction of the Commissioner that the value of such shares or certificates is not greater than the amount of the tax that would otherwise be imposed on such delivery or transfer.[7]

(26 U. S. C. 1946 ed., Sec. 1802.)

Treasury Regulations 71 (1941 ed.)

SUBPART D.—SALES AND TRANSFERS OF CAPITAL STOCK AND SIMILAR INTERESTS

SEC. 113.30. SCOPE OF TAX.—Section 1802 (b) imposes a tax on sales, or agreements to sell, or memoranda of sales, of stock; on deliveries of stock with intent to pass title; on transfers of legal title to stock; on transfers of rights to subscribe for stock; and on transfers of rights to receive stock. The tax applies to the specified dealings or transactions in stock, whether made before, after, or without the issuance of a certificate, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, and without regard to whether the holder or transferee of the stock or specified right is entitled in any manner

[7] This paragraph was added to Section 1802 (b) by Section 402 of the Revenue Act of 1939, c. 247, 53 Stat. 862. Section 1802 of the code was also amended by Section 506 of the Revenue Act of 1942, c. 619, 56 Stat. 798, in respects not material here and hence not reflected in this appendix.

to the benefit thereof. The tax accrues at the time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to, the stock or specified right, regardless of the time or manner of delivery of the certificate or agreement or memorandum of sale.

SEC. 113.31. DEFINITIONS.—As used hereinafter in this subpart, the term "stock" includes any of the shares or certificates mentioned in section 1802 (a) and rights to subscribe for or to receive such shares or certificates, * * *

* * * * *

SEC. 113.33. SALES AND TRANSFERS SUBJECT TO TAX.—The following transactions in stock, as defined in section 113.31 (unless otherwise exempt), are subject to the tax: All sales, agreements to sell, and transfers with or without benefit to the transferee, whether effected by means of certificates or other instruments or by entries on the books of the issuing corporation or other entity or otherwise. The following are examples of taxable transactions:

* * * * *

(*d*) Transfer to or by trustees. * * *

* * * * *

(*j*) Transfer upon order of the purchaser of stock to another person; transfer of the right to receive a stock dividend already declared; issuance of stock to a person other than the subscriber or one paying the consideration for the issuance; and all other transfers of rights to receive; also all transfers of rights to subscribe for stock.

* * * * *

SEC. 113.35. SPECIFIC EXEMPTIONS PROVIDED IN SECTION 1802 (b).—* * *

* * * * *

(*e*) *Transfers between fiduciaries and their nominees.*—The tax does not apply to deliveries or transfers of stock from a fiduciary to a nominee of such fiduciary, or from one nominee of such fiduciary to another, if the stock continues to be held by such nominee for the same purpose for which it would be held if retained by such fiduciary, or from the nominee to such fiduciary. The person making an exempt transfer under this subsection shall, at the time of such transfer, furnish and attach to the certificate a statement setting forth the relevant facts.

(*f*) *Transfers to or by a custodian.*—The tax does not apply to the delivery or transfer of stock from the owner thereof to a custodian, if under a written agreement between the owner and the custodian, the stock so delivered or transferred is to be held or disposed of by such custodian for, and subject at all times to the instructions of, the owner; or to the delivery or transfer of stock from such custodian to such owner.

The tax also does not apply to the delivery or transfer from such custodian to a registered nominee of such custodian, or from the owner direct to such registered nominee, or from one such nominee to another such nominee, if the stock continues to be held by the nominee for the same purpose for which it would be held if retained by such custodian; or from such nominee to such custodian or the owner. No exemption is granted unless the nomi-

nee is registered in the manner provided in section 113.153.

The tax further does not apply to the delivery or transfer of stock from a custodian of the owner to another custodian of the owner, or from the registered nominee of the first custodian to the second custodian or the registered nominee of the latter, if the transfer would have been exempt under the first or second paragraphs of this subsection if made by the owner direct to the second custodian or the registered nominee of the latter.

The exception specified in this subsection shall not be granted in any case unless the delivery or transfer is accompanied by a statement, signed by the custodian, in substantially the following form:

> It is hereby certified that the transfer of the attached shares is exempt from the transfer tax under the provisions of section 1802 (b) of the Internal Revenue Code, and that evidence in proof of the exemption is maintained by us and is available for inspection by internal revenue officers.
>
> ----------,
> (Signature of Custodian)

The custodian contemplated by this subsection is a mere custodian and does not include a trustee. A mere custodian is a person to whom there are delivered or transferred shares or certificates of stock to be held or disposed of by the custodian for, and subject at all times to the instructions of, the owner and not otherwise.

* * * * *

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II